

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID PAUL GUERRERO,

Defendant and Appellant.

B301518

(Los Angeles County  
Super. Ct. No. TA097537)

APPEAL from an order of the Superior Court of Los Angeles County, Allen J. Webster, Judge. Reversed and remanded with directions.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Charles S. Lee and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

---

David Paul Guerrero, who was convicted of second degree murder, appeals from an order denying his petition for resentencing under Penal Code section 1170.95.<sup>1</sup> Guerrero contends, the Attorney General concedes, and we agree the trial court erred in finding Guerrero failed to make a prima facie showing he is eligible for resentencing under section 1170.95. Accordingly, we reverse the trial court's order and remand the matter for further proceedings under section 1170.95, beginning with the appointment of counsel for Guerrero and briefing by the parties pursuant to section 1170.95, subdivision (c), which the parties agree is the appropriate relief.

### **BACKGROUND**

In August 2008, an information charged Guerrero and two codefendants with one count of murder (§ 187, subd. (a)), committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)). The information also alleged that, in the commission of the murder, a codefendant of Guerrero personally and intentionally discharged a handgun, and a principal personally and intentionally discharged a handgun. (§ 12022.53, subds. (b)-(e).)

In October 2009, a jury found Guerrero and his two codefendants guilty of first degree murder and found true the gang and firearm enhancements alleged in the information. Each defendant was sentenced to 50 years to life in prison. Guerrero and his codefendants appealed, and we reversed the convictions for evidentiary error. (*People v. Toledo* (Oct. 5, 2011, B219800) [nonpub. opn.].)

---

<sup>1</sup> Further statutory references are to the Penal Code.

At a retrial in 2014, the prosecution presented evidence that the murder victim, Darryl White, and his cousin defaced some graffiti representing the gang of Guerrero and his codefendants. Guerrero gave a revolver to one of his codefendants, and Guerrero and fellow gang members set off in a vehicle in search of White and his cousin. When the vehicle approached White and his cousin, one of Guerrero's codefendants stuck his arm out of the window of the vehicle and brandished a handgun at White and his cousin, who both ran away. One of Guerrero's codefendants, who had the revolver Guerrero had given him, and a fellow gang member, who also had a gun, set off on foot after White. When they caught up to White, they fired upon him, both striking White with bullets and killing him. The shooters ran to the vehicle, where Guerrero and fellow gang members were waiting, and the vehicle drove away. (*People v. Guerrero* (Jan. 31, 2017, B259164) [nonpub. opn.], pp. 2-3.)

The prosecutor argued to the jury that Guerrero either (1) directly aided and abetted the first degree premeditated murder or (2) aided and abetted an assault with a firearm and was guilty of first degree premeditated murder under the natural and probable consequences doctrine. The trial court instructed the jury on theories of direct aiding and abetting a murder and aiding and abetting under the natural and probable consequences doctrine. (CALCRIM No. 400 [Aiding and Abetting: General Principles]; CALCRIM No. 401 [Aiding and Abetting: Intended Crimes]; and CALCRIM No. 403 [Natural and Probable Consequences (Only Non-Target Offense Charged)].)

The jury found Guerrero and his codefendants guilty of first degree premeditated murder and found true the gang and firearm enhancement allegations. (*People v. Guerrero, supra*,

B259164, p. 2.) The trial court again sentenced Guerrero to 50 years to life in prison.

Guerrero appealed, contending the trial court erred in admitting certain evidence and in instructing the jury on aider and abettor liability. We rejected his claim of evidentiary error but agreed the trial court erroneously instructed on the natural and probable consequences doctrine as it applies to aider and abettor liability. (*People v. Guerrero, supra*, B259164, p. 2.) We explained that, as our Supreme Court held in *People v. Chiu* (2014) 59 Cal.4th 155, 166, an aider and abettor may be convicted of first degree premeditated murder as a direct aider and abettor of the murder, but not as an aider and abettor under the natural and probable consequences doctrine. (*Guerrero*, at p. 14.) As the record did not establish beyond a reasonable doubt that the jury based its verdict on a theory that Guerrero directly aided and abetted the murder, as opposed to a theory that he aided and abetted under the natural and probable consequences doctrine, we concluded the error was not harmless and reversed Guerrero's conviction for first degree murder. (*Id.* at p. 16.)

The prosecution had the option of retrying Guerrero for first degree murder or accepting a modification of the judgment to reflect a conviction for second degree murder and resentencing Guerrero accordingly. (*People v. Guerrero, supra*, B259164, pp. 16, 22.) The prosecution chose the second option. As reflected in the September 21, 2017 abstract of judgment, Guerrero was resentenced to 40 years to life: 15 years to life for second degree murder, plus 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1).

On August 9, 2019, Guerrero, representing himself, filed a form petition for resentencing under section 1170.95, a statute

which permits a person convicted of felony murder or murder under a natural and probable consequences theory to petition the court to have the murder conviction vacated and to be resentenced, if the person could not be convicted of murder today in light of amendments to sections 188 and 189. Senate Bill No. 1437, which added section 1170.95 and amended sections 188 and 189, was enacted in 2018 “to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1(f), p. 6674; §§ 188, subd. (a)(3) & 189, subd. (e).)

In his form petition, Guerrero checked boxes stating, in pertinent part, that he was convicted of second degree murder under the natural and probable consequences doctrine or under the second degree felony murder doctrine and he could not now be convicted of murder because of changes to sections 188 and 189, effective January 1, 2019. Guerrero also checked the box requesting the trial court appoint counsel to represent him in connection with his petition.

On August 19, 2019, the trial court issued a minute order, denying Guerrero’s petition for resentencing without appointing counsel for him or holding a hearing. In the minute order, the court summarized the circumstances of the crime and set forth the facts supporting the court’s conclusion Guerrero cannot make a prima facie showing he is eligible for resentencing under section 1170.95 because “he was convicted by a jury as a direct aider and abettor to the White murder,” and “he was not

prosecuted under either a felony murder or a natural and probable consequence[s] theory of culpability.”<sup>2</sup>

### **DISCUSSION**

Guerrero contends, the Attorney General concedes, and we agree Guerrero made a prima facie showing he is eligible for relief under section 1170.95, and the trial court erred in denying his petition for resentencing without appointing counsel for him and allowing briefing by the parties under section 1170.95, subdivision (c).

Under section 1170.95, subdivision (a), “A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.”

In amending section 188, Senate Bill No. 1437 added the following provision: “Except as stated in subdivision (e) of

---

<sup>2</sup> The minute order does not specify which portions of the record of conviction or court file the trial court reviewed in ruling on the petition.

Section 189 [a provision not relevant here], in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.” (§ 188, subd. (a)(3); Stats. 2018, ch. 1015, § 2.)

A trial court that receives a petition for resentencing under section 1170.95—which complies with the statutory requirements regarding filing, service, and contents of the petition set forth in subdivision (b), as Guerrero’s petition does—must follow these steps: “The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.” (§ 1170.95, subd. (c).)

This appeal concerns the first sentence, or first step, of section 1170.95, subdivision (c), which states: “The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.” At this step, “if the petitioner’s ineligibility for resentencing under section 1170.95 is not established as a matter of law by the record of conviction, the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties’ briefing and analysis,

whether the petitioner has made a prima facie showing he or she is entitled to relief.” (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 330, review granted Mar. 18, 2020, S260493.)

Guerrero made a prima facie showing under the first sentence, or first step, of section 1170.95, subdivision (c), as the record does not establish Guerrero’s ineligibility for resentencing as a matter of law. The record before us includes, and we have considered: (1) the jury instructions on direct aiding and abetting and aiding and abetting under the natural and probable consequences doctrine, given at Guerrero’s 2014 retrial; (2) an excerpt from the reporter’s transcript including the prosecutor’s argument to the jury at the retrial regarding Guerrero’s liability for first degree premeditated murder as a direct aider and abettor and as an aider and abettor under the natural and probable consequences doctrine; and our opinion from Guerrero’s second appeal (*People v. Guerrero, supra*, B259164). As Guerrero argues, the Attorney General concedes, and we concluded in the aforementioned opinion, based on the jury instructions given and the prosecutor’s argument to the jury on aiding and abetting under the natural and probable consequences doctrine, the jury could have found Guerrero guilty of murder under the natural and probable consequences doctrine, a theory of murder no longer viable after Senate Bill No. 1437 amended section 188. Thus, the trial court erred in denying Guerrero’s petition for resentencing on the ground Guerrero did not make a prima facie showing he is eligible for resentencing under section 1170.95, and we reverse the order.

Upon remand, the trial court must follow the steps outlined in section 1170.95, beginning with the appointment of counsel for Guerrero and briefing by the parties under section 1170.95,



subdivision (c). We express no opinion on whether Guerrero can make the next prima facie showing under section 1170.95, within the meaning of the last sentence of subdivision (c), or whether Guerrero is entitled to an evidentiary hearing, as described in subdivision (d) of section 1170.95.

**DISPOSITION**

The order denying the petition for resentencing is reversed and the matter is remanded for further proceedings under section 1170.95, consistent with this opinion.

NOT TO BE PUBLISHED

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

SINANIAN, J.\*

---

\* Judge of the Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.